

COMMONWEALTH OF VIRGINIA  
STATE AIR POLLUTION CONTROL BOARD

9 VAC 5 CHAPTER 160.  
REGULATION FOR GENERAL CONFORMITY.

PART I.  
GENERAL DEFINITIONS.

9 VAC 5-160-10. General.  
9 VAC 5-160-20. Terms defined.

9 VAC 5-160-10. General.

A. For the purpose of this regulation and subsequent amendments or any orders issued by the board, the words or terms shall have the meanings given them in 9 VAC 5-160-20.

B. Unless specifically defined in the Virginia Air Pollution Control Law or in this regulation, terms used shall have the meanings given them by the federal Clean Air Act, other U.S. Environmental Protection Agency (EPA) regulations, 9 VAC 5-170-20 (definitions, Regulation for General Administration), or commonly ascribed to them by recognized authorities, in that order of priority.

9 VAC 5-160-20. Terms defined.

"Administrator" means the administrator of EPA or an authorized representative.

"Affected federal land manager" means the federal agency or the federal official charged with direct responsibility for management of an area designated as class I under the federal Clean Air Act, and located within 100 kilometers of the proposed federal action.

"Ambient air" means that portion of the atmosphere, external to buildings, to which the general public has access.

"Applicable implementation plan" means the portion or portions of the state implementation plan, or the most recent revision thereof, which has been approved under §110 of the federal Clean Air Act, or promulgated under §110(c) of the federal Clean Air Act, or promulgated or approved pursuant to regulations promulgated under § 301(d) of the federal Clean Air Act and which implements the relevant requirements of the federal Clean Air Act.

"Areawide air quality modeling analysis" means an assessment on a scale that includes the entire nonattainment area or maintenance area which uses an air quality

dispersion model to determine the effects of emissions on air quality.

"Board" means the State Air Pollution Control Board or its designated representative.

"Cause or contribute to a new violation" means a federal action that:

1. Causes a new violation of a national ambient air quality standard at a location in a nonattainment or maintenance area which would otherwise not be in violation of the standard during the future period in question if the federal action were not taken; or

2. Contributes, in conjunction with other reasonably foreseeable actions, to a new violation of a national ambient air quality standard at a location in a nonattainment or maintenance area in a manner that would increase the frequency or severity of the new violation.

"Caused by" means, as used in the terms "direct emissions" and "indirect emissions," emissions that would not otherwise occur in the absence of the federal action.

"Consultation" means that one party confers with another identified party, provides all information to that party needed for meaningful input, and, prior to taking any action, considers the views of that party and responds to those views in a timely, substantive, written manner prior to any final decision on the action. The views and written response shall be made part of the record of any decision or action.

"Control" means the ability to regulate the emissions from the action. The ability to regulate may be demonstrated directly, such as through the use of emission control equipment, or indirectly, such as through the implementation of regulations or conditions on the nature of the activity that may be established in permits or approvals or by the design of the action. An example of control includes the ability of a federal agency to control the level of vehicle emissions by controlling the size of a parking facility and setting requirements for employee trip reductions.

"Criteria pollutant" means any pollutant for which there is established a national ambient air quality standard in 40 CFR Part 50.

"Department" means any employee or other representative of the Virginia Department of Environmental Quality, as designated by the director.

"Direct emissions" means those emissions of a criteria pollutant or its precursors that are caused or initiated by the federal action and occur at the same time and place as the action.

"Director" means the director of the Virginia Department of Environmental Quality.

"Emergency" means, in the context of 9 VAC 5-160-30, a situation where extremely quick action on the part of federal agencies involved is needed and where the timing of the federal activities makes it impractical to meet the requirements of this regulation, such as natural disasters like hurricanes or earthquakes, civil disturbances such as terrorist acts, and military mobilizations.

"Emergency" means, in the context of 9 VAC 5-160-40, a situation that immediately and unreasonably affects, or has the potential to immediately and unreasonably affect, public health, safety or welfare; the health of animal or plant life; or property, whether used for recreational, commercial, industrial, agricultural or other reasonable use.

"Emissions budgets" are those portions of the total allowable emissions defined in the applicable implementation plan for a certain date for the purpose of meeting reasonable further progress milestones or attainment or maintenance demonstrations, for any criteria pollutant or its precursors, specifically allocated by the applicable implementation plan to mobile sources, to any stationary source or class of stationary sources, to any federal action or any class of action, to any class of area sources, or to any subcategory of the emissions inventory. The allocation system shall be specific enough to assure meeting the criteria of §176(c)(1)(B) of the federal Clean Air Act. An emissions budget may be expressed in terms of an annual period, a daily period, or other period established in the applicable implementation plan.

"Emissions offsets" means, for the purposes of 9 VAC 5-160-160, emissions reductions which are quantifiable, consistent with the applicable implementation plan attainment and reasonable future progress demonstrations, surplus to reductions required by, and credited to, other applicable implementation plan provisions, enforceable under both state and federal law, and permanent within the timeframe specified by that program. Emissions reductions intended to be achieved as emissions offsets under this regulation shall be monitored and enforced in a manner equivalent to that under the new source review program.

"Emissions that a federal agency has a continuing program responsibility for" means emissions that are specifically caused by an agency carrying out its authorities, and does not include emissions that occur due to subsequent activities, unless the activities are required by the federal agency. Where an agency, in performing its normal program responsibilities, takes actions itself or imposes conditions that result in air pollutant emissions by a non-federal entity taking subsequent actions, the emissions are covered by the meaning of a continuing program responsibility.

"EPA" means the United States Environmental Protection Agency.

"Facility" means something that is built, installed, or established to serve a particular purpose; includes, but is not limited to, buildings, installations, public works, businesses, commercial and industrial plants, shops and stores, heating and power

plants, apparatus, processes, operations, structures, and equipment of all types.

"Federal action" means any activity engaged in by a federal agency, or any activity that a federal agency supports in any way, provides financial assistance for, licenses, permits, or approves, other than activities related to transportation plans, programs, and projects developed, funded, or approved under title 23 USC or the Federal Transit Act (49 USC 1601 et seq.). Where the federal action is a permit, license, or other approval for some aspect of a non-federal undertaking, the relevant action is the part, portion, or phase that the non-federal undertaking that requires the federal permit, license, or approval.

"Federal agency" means a department, agency, or instrumentality of the federal government.

"Federal Clean Air Act" means 42 USC 7401 et seq.

"Increase the frequency or severity of any existing violation of any standard in any area" means to cause a nonattainment area to exceed a standard more often, or to cause a violation at a greater concentration than previously existed or would otherwise exist during the future period in question, if the project were not implemented.

"Indirect emissions" means those emissions of a criteria pollutant or its precursors that:

1. Are caused by the federal action, but may occur later in time, or may be farther removed in distance from the action itself but are still reasonably foreseeable; and

2. The federal agency can practicably control and will maintain control over due to a continuing program responsibility of the federal agency, including, but not limited to:

- a. Traffic on or to, or stimulated or accommodated by, a proposed facility which is related to increases or other changes in the scale or timing of operations of the facility;

- b. Emissions related to the activities of employees of contractors or federal employees;

- c. Emissions related to employee commutation and similar programs to increase average vehicle occupancy imposed on all employers of a certain size in the locality; and

- d. Emissions related to the activities of contractors or leaseholders that may be addressed by provisions that are usual and customary for contracts or leases or within the scope of contractual protection of the interests of the

United States.

"Lead Planning Organization" means the organization certified by the state as being responsible for the preparation of control strategy implementation plan revisions for nonattainment areas under §174 of the federal Clean Air Act. The organization includes elected officials of local governments in the affected nonattainment area, and representatives of the department, the Virginia Department of Transportation, the metropolitan planning organizations for the affected area, and other agencies and organizations that have responsibilities for developing, submitting or implementing any of the plan revisions. It is the forum for cooperative air quality planning decision-making.

"Local air quality modeling analysis" means assessment of localized impacts on a scale smaller than the entire nonattainment or maintenance area, including, for example, congested roadway intersections and highways or transit terminals, which uses an air quality dispersion model to determine the effects of emissions on air quality.

"Maintenance area" means any geographic region of the United States previously designated as a nonattainment area and subsequently redesignated to attainment subject to the requirement to develop a maintenance plan.

"Maintenance plan" means a revision to the applicable implementation plan, meeting the requirements of §175A of the federal Clean Air Act.

"Metropolitan planning organization" means the organization designated as being responsible, together with the Commonwealth of Virginia, for conducting the continuing, cooperative, and comprehensive planning process under 23 USC 134 and 49 USC 1607.

"Milestone" means as defined in §§182(g) and 189(c)(1) of the federal Clean Air Act. A milestone consists of an emissions level and the date on which it is required to be achieved.

"National ambient air quality standards" means those standards established pursuant to §109 of the federal Clean Air Act.

"NEPA" means the National Environmental Policy Act of 1969 as amended (42 USC 4321 et seq.)

"New source review program" means a program for the preconstruction review and permitting of new stationary sources or expansions to existing ones in accordance with regulations promulgated to implement the requirements of §§110 (a)(2)(C), 165 (relating to permits in prevention of significant deterioration areas) and 173 (relating to permits in nonattainment areas) of the federal Clean Air Act.

"Nonattainment area" means any geographic region of the United States which has been designated as nonattainment under § 107 of the federal Clean Air Act for

any pollutant for which a national ambient air quality standard exists.

"PM<sub>10</sub>" means particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers as measured by the applicable reference method or an equivalent method.

"Person" means an individual, corporation, partnership, association, a governmental body, a municipal corporation, or any other legal entity.

"Precursors of a criteria pollutant" means:

1. For ozone,
  - a. Nitrogen oxides, unless an area is exempted from nitrogen oxides requirements under §182(f) of the federal Clean Air Act, and
  - b. Volatile organic compounds; and
2. For PM<sub>10</sub>, those pollutants described in the PM<sub>10</sub> nonattainment area applicable implementation plan as significant contributors to the particulate matter levels.

"Reasonably foreseeable emissions" are projected future indirect emissions that are identified at the time the conformity determination is made; the location of the emissions is known to the extent adequate to determine the impact of the emissions; and the emissions are quantifiable, as described and documented by the federal agency based on its own information and after reviewing any information presented to the federal agency.

"Regional water or wastewater projects" means construction, operation, and maintenance of water or wastewater conveyances, water or wastewater treatment facilities, and water storage reservoirs which affect a large portion of a nonattainment or maintenance area.

"Regionally significant action" means a federal action for which the direct and indirect emissions of any pollutant represent 10% or more of a nonattainment or maintenance area's emissions inventory for that pollutant.

"Source" means any one or combination of the following: buildings, structures, facilities, installations, articles, machines, equipment, landcraft, watercraft, aircraft, or other contrivances which contribute, or may contribute, either directly or indirectly to air pollution. Any activity by any person that contributes, or may contribute, either directly or indirectly to air pollution, including, but not limited to, open burning, generation of fugitive dust or emissions, and cleaning with abrasives or chemicals.

"Total of direct and indirect emissions" means the sum of direct and indirect

emissions increases and decreases caused by the federal action, that is, the "net" emissions considering all direct and indirect emissions. Any emissions decreases used to reduce the total shall have already occurred by the time the corresponding increases occur or shall be enforceable under state and federal law. The portion of emissions which are exempt or presumed to conform under 9 VAC 5-160-30 are not included in the "total of direct and indirect emissions," except as provided in 9 VAC 5-160-30 M. The "total of direct and indirect emissions" includes emissions of criteria pollutants and emissions of precursors of criteria pollutants. Segmentation of projects for conformity analyses when emissions are reasonably foreseeable is prohibited.

"Virginia Air Pollution Control Law" means Chapter 13 (§10.1-1300 et seq.) of Title 10.1 of the Code of Virginia.

"Welfare" means that language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, human-made materials, animals, wildlife, weather, visibility and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well being.

PART II.  
GENERAL PROVISIONS.

- 9 VAC 5-160-30. Applicability.
- 9 VAC 5-160-40. Authority of board and department.
- 9 VAC 5-160-50. Repealed.
- 9 VAC 5-160-60. Repealed.
- 9 VAC 5-160-70. Repealed.
- 9 VAC 5-160-80. Relationship of state regulations to federal regulations.
- 9 VAC 5-160-90. Repealed.
- 9 VAC 5-160-100. Repealed.

9 VAC 5-160-30. Applicability.

A. The provisions of this regulation shall apply in all nonattainment and maintenance areas for criteria pollutants for which the area is designated nonattainment or has a maintenance plan.

B. The provisions of this regulation apply with respect to emissions of the following criteria pollutants: ozone, carbon monoxide, nitrogen dioxide, and particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM<sub>10</sub>).

C. The provisions of this regulation apply with respect to emissions of the following precursor pollutants:

1. For ozone:

a. Nitrogen oxides, unless an area is exempted from nitrogen oxides requirements under §182(f) of the federal Clean Air Act, and

b. Volatile organic compounds.

2. For PM<sub>10</sub>, those pollutants described in the PM<sub>10</sub> nonattainment area applicable implementation plan as significant contributors to the particulate matter levels.

D. Conformity determinations for federal actions related to transportation plans, programs, and projects developed, funded, or approved under title 23 USC or the Federal Transit Act (49 USC 1601 et seq.) shall meet the procedures and criteria of the Regulation for Transportation Conformity (9 VAC 5 Chapter 150), in lieu of the procedures set forth in this regulation.

E. For federal actions not covered by subsection D of this section, a conformity determination is required for each pollutant where the total of direct and indirect emissions in a nonattainment or maintenance area caused by a federal action would equal or exceed any of the rates in subsections E 1 or 2 of this section.

1. For the purposes of this subsection, the following rates apply in nonattainment areas:

	Tons per year
Ozone (VOCs or NO <sub>x</sub> ):	
Serious nonattainment areas	50
Severe nonattainment areas	25
Extreme nonattainment areas	10
Other ozone nonattainment areas outside an ozone transport region	100
Marginal and moderate nonattainment areas inside an ozone transport region:	
VOC	50
NO <sub>x</sub>	100
Carbon monoxide, all nonattainment areas	100
Sulfur dioxide or nitrogen dioxide, all nonattainment areas	100
PM <sub>10</sub> :	
Moderate nonattainment areas	100
Serious nonattainment areas	70
Lead, all nonattainment areas	25

2. For the purposes of this subsection, the following rates apply in maintenance areas:

	Tons per year
Ozone (NO <sub>x</sub> ), sulfur dioxide, or nitrogen dioxide, all maintenance areas	100
Ozone (VOCs):	
Maintenance areas inside an ozone transport region	50
Maintenance areas outside an ozone transport region	100
Carbon monoxide, all maintenance areas	100
PM <sub>10</sub> , all maintenance area	100

F. The requirements of this section shall not apply to:

1. Actions where the total of direct and indirect emissions are below the emissions levels specified in subsection E of this section.

2. The following actions which would result in no emissions increase or an increase in emissions that is clearly de minimis:

- a. Judicial and legislative proceedings.
- b. Continuing and recurring activities such as permit renewals where activities conducted shall be similar in scope and operation to activities currently being conducted.
- c. Rulemaking and policy development and issuance.
- d. Routine maintenance and repair activities, including repair and maintenance of administrative sites, roads, trails, and facilities.
- e. Civil and criminal enforcement activities, such as investigations, audits, inspections, examinations, prosecutions, and the training of law enforcement personnel.
- f. Administrative actions such as personnel actions, organizational changes, debt management, internal agency audits, program budget proposals, and matters relating to administration and collection of taxes, duties, and fees.
- g. The routine, recurring transportation of materiel and personnel.
- h. Routine movement of mobile assets, such as ships and aircraft, in home port reassignments and stations (when no new support facilities or personnel are required) to perform as operational groups and for repair or overhaul or both.
- i. Maintenance dredging and debris disposal where no new depths are required, applicable permits are secured, and disposal shall be at an approved disposal site.
- j. With respect to existing structures, properties, facilities, and lands where future activities conducted shall be similar in scope and operation to activities currently being conducted at the existing structures, properties, facilities, and lands, actions such as relocation of personnel, disposition of federally-owned existing structures, properties, facilities, and lands, rent subsidies, operation and maintenance cost subsidies,

the exercise of receivership or conservatorship authority, assistance in purchasing structures, and the production of coins and currency.

- k. The granting of leases, licenses such as for exports and trade, permits, and easements where activities conducted shall be similar in scope and operation to activities currently being conducted.
- l. Planning, studies, and provision of technical assistance.
- m. Routine operation of facilities, mobile assets, and equipment.
- n. Transfers of ownership, interests, and titles in land, facilities, and real and personal properties, regardless of the form or method of the transfer.
- o. The designation of empowerment zones, enterprise communities, or viticultural areas.
- p. Actions by any of the federal banking agencies or the federal reserve banks, including actions regarding charters, applications, notices, licenses, the supervision or examination of depository institutions or depository institution holding companies, access to the discount window, or the provision of financial services to banking organizations or to any state, agency, or instrumentality of the United States.
- q. Actions by the Board of Governors of the federal reserve system or any federal reserve bank to effect monetary or exchange rate policy.
- r. Actions that implement a foreign affairs function of the United States.
- s. Actions or portions thereof associated with transfers of land, facilities, title, and real properties through an enforceable contract or lease agreement where the delivery of the deed is required to occur promptly after a specific, reasonable condition is met, such as promptly after the land is certified as meeting the requirements of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and where the federal agency does not retain continuing authority to control emissions associated with the lands, facilities, title, or real properties.
- t. Transfers of real property, including land, facilities, and related personal property from a federal entity to another federal entity, and assignments of real property, including land, facilities, and related personal property from a federal entity to another federal entity, for subsequent deeding to eligible applicants.
- u. Actions by the Department of the Treasury to effect fiscal policy and to exercise the borrowing authority of the United States.

- 3. Actions where the emissions are not reasonably foreseeable, such

as the following:

a. Initial outer continental shelf lease sales which are made on a broad scale and are followed by exploration and development plans on a project level.

b. Electric power marketing activities that involve the acquisition, sale, and transmission of electric energy.

4. Individual actions which implement a decision to conduct or carry out a program that has been found to conform to the applicable implementation plan, such as prescribed burning actions which are consistent with a conforming land management plan, that has been found to conform to the applicable implementation plan. The land management plan shall have been found to conform within the past five years.

G. Notwithstanding the other requirements of this section, a conformity determination is not required for the following federal actions or portions thereof:

1. The portion of an action that includes major new or modified stationary sources that require a permit under the new source review program.

2. Actions in response to emergencies or natural disasters such as hurricanes, earthquakes, etc., which are commenced on the order of hours or days after the emergency or disaster and, if applicable, which meet the requirements of subsection H of this section.

3. Research, investigations, studies, demonstrations, or training (other than those exempted under subsection F 2 of this section), where no environmental detriment is incurred, or the particular action furthers air quality research, as determined by the department.

4. Alteration and additions of existing structures as specifically required by new or existing applicable environmental legislation or environmental regulations (for example, hush houses for aircraft engines and scrubbers for air emissions).

5. Direct emissions from remedial and removal actions carried out under CERCLA and associated regulations to the extent the emissions either comply with the substantive requirements of the new source review program, or are exempted from other environmental regulation under the provisions of CERCLA and applicable regulations issued under CERCLA.

H. Federal actions which are part of a continuing response to an emergency or disaster under subsection G 2 of this section and which are to be taken more than six months after the commencement of the response to the emergency or disaster under subsection G 2 of this section are exempt from the requirements of this subsection only if:

1. The federal agency taking the actions makes a written determination

that, for a specified period not to exceed an additional six months, it is impractical to prepare the conformity analyses which would otherwise be required and the actions cannot be delayed due to overriding concerns for public health and welfare, national security interests, and foreign policy commitments; or

2. For actions which are to be taken after those sections covered by subsection H 1 of this section, the federal agency makes a new determination as provided in subsection H 1 of this section.

I. Notwithstanding other requirements of this regulation, actions specified by individual federal agencies that have met the criteria set forth in either subsection J 1 or J 2 of this section and the procedures set forth in subsection K of this section are presumed to conform, except as provided in subsection M of this section.

J. The federal agency shall meet the criteria for establishing activities that are presumed to conform by fulfilling the requirements set forth in either subsection J 1 or J 2 of this section.

1. The federal agency shall clearly demonstrate, using methods consistent with this regulation, that the total of direct and indirect emissions from the type of activities which would be presumed to conform would not:

a. Cause or contribute to any new violation of any standard in any area;

b. Interfere with the provisions in the applicable implementation plan for maintenance of any standard;

c. Increase the frequency or severity of any existing violation of any standard in any area;

d. Delay timely attainment of any standard or any required interim emissions reductions or other milestones in any area including, where applicable, emission levels specified in the applicable implementation plan for purposes of:

(1) A demonstration of reasonable further progress;

(2) A demonstration of attainment; or

(3) A maintenance plan.

2. The federal agency shall provide documentation that the total of direct and indirect emissions from the future actions would be below the emission rates for a conformity determination that are established in subsection B of this section, based, for example, on similar actions taken over recent years.

K. In addition to meeting the criteria for establishing exemptions set forth in subsections J 1 or J 2 of this section, the following procedures shall also be complied with to presume that activities shall conform:

1. The federal agency shall identify through publication in the Federal Register its list of proposed activities that are presumed to conform, and the analysis, assumptions, emissions factors, and criteria used as the basis for the presumptions;

2. The federal agency shall notify the appropriate EPA regional office(s), department, and local air quality agencies and, where applicable, the lead planning organization, and the metropolitan planning organization and provide at least 30 days for the public to comment on the list of proposed activities presumed to conform;

3. The federal agency shall document its response to all the comments received and make the comments, response, and final list of activities available to the public upon request; and

4. The federal agency shall publish the final list of the activities in the Federal Register.

L. Notwithstanding the other requirements of this section, when the total of direct and indirect emissions of any pollutant from a federal action does not equal or exceed the rates specified in subsection E of this section, but represents 10% or more of a nonattainment or maintenance area's total emissions of that pollutant, the action is defined as a regionally significant action and the requirements of 9 VAC 5-160-110 and 9 VAC 5-160-130 through 9 VAC 5-160-180 shall apply for the federal action.

M. Where an action presumed to be de minimis under subsections F 1 or F 2 of this section or otherwise presumed to conform under subsection I of this section is a regionally significant action or where an action otherwise presumed to conform under subsection I of this section does not in fact meet one of the criteria in subsection J 1 of this section, that action shall not be considered de minimis or presumed to conform and the requirements of 9 VAC 5-160-110 and 9 VAC 5-160-130 through 9 VAC 5-160-180 shall apply for the federal action.

N. Any measures used to affect or determine applicability of this regulation, as determined under this section, shall result in projects that are in fact de minimis, shall result in the de minimis levels prior to the time the applicability determination is made, and shall be state or federally enforceable. Any measures that are intended to reduce air quality impacts for this purpose shall be identified (including the identification and quantification of all emission reductions claimed) and the process for implementation (including any necessary funding of the measures and tracking of the emission reductions) and enforcement of the measures shall be described, including an implementation schedule containing explicit timelines for implementation. Prior to a determination of applicability, the federal agency making the determination shall obtain written commitments from the appropriate persons or agencies to implement any

measures which are identified as conditions for making the determinations. The written commitment shall describe the mitigation measures and the nature of the commitment, in a manner consistent with the previous sentence. After this regulation is approved by EPA, enforceability through the applicable implementation plan of any measures necessary for a determination of applicability shall apply to all persons who agree to reduce direct and indirect emissions associated with a federal action for a conformity applicability determination.

9 VAC 5-160-40. Authority of board and department.

A. No provision of this regulation shall limit the power of the board to take such appropriate action as necessary to control and abate air pollution in emergency situations.

B. In accordance with the Virginia Air Pollution Control Law and the Administrative Process Act and by the adoption of this regulation, the board confers upon the department the administrative, enforcement and decision making authority enumerated in this regulation.

C. The board reserves the right to exercise its authority in any of the powers delegated in this regulation should it choose to do so.

D. The director has final authority to adjudicate contested decisions of subordinates delegated powers by the director prior to appeal of the decisions to the circuit court or consideration by the board.

9 VAC 5-160-50. Repealed.

9 VAC 5-160-60. Repealed.

9 VAC 5-160-70. Repealed.

9 VAC 5-160-80. Relationship of state regulations to federal regulations.

A. In order for the Commonwealth of Virginia to fulfill its obligations under the federal Clean Air Act, some provisions of this regulation are required to be approved by EPA and when approved those provisions become federally enforceable.

B. In cases where this regulation specifies that procedures or methods shall be approved by, acceptable to, or determined by the board or department or other similar phrasing or specifically provide for decisions to be made by the board or department, it may be necessary to have the actions (approvals determinations, exemptions, exclusions, or decisions) reviewed and confirmed as acceptable or approved by EPA in order to make them federally enforceable. Determination of which state actions require federal confirmation or approval and the administrative mechanism for making associated confirmation or approval decisions shall be made on a case-by-case basis in accordance with EPA regulations and policy.

9 VAC 5-160-90. Repealed.

PART III.  
CRITERIA AND PROCEDURES FOR  
MAKING CONFORMITY DETERMINATIONS.

- 9 VAC 5-160-110. General.
- 9 VAC 5-160-120. Conformity analysis.
- 9 VAC 5-160-130. Reporting requirements.
- 9 VAC 5-160-140. Public participation.
- 9 VAC 5-160-150. Frequency of conformity determinations.
- 9 VAC 5-160-160. Criteria for determining conformity.
- 9 VAC 5-160-170. Procedures for conformity determinations.
- 9 VAC 5-160-180. Mitigation of air quality impacts.
- 9 VAC 5-160-190. Savings provision.
- 9 VAC 5-160-200. Review and confirmation of this chapter by board.

9 VAC 5-160-110. General.

A. No federal agency shall engage in, support in any way, or provide financial assistance for, license, or permit, or approve any activity which does not conform to an applicable implementation plan.

B. A federal agency must make a determination that a federal action conforms to the applicable implementation plan in accordance with the requirements of this regulation before the action is taken.

C. Subsection B of this section does not include federal actions where either:

1. A NEPA analysis was completed as evidenced by a final environmental assessment, environmental impact statement, or finding of no significant impact that was prepared prior to January 31, 1994, or

2. a. Prior to January 31, 1994, an environmental assessment was commenced or a contract was awarded to develop the specific environmental analysis,

b. Sufficient environmental analysis is completed by March 15, 1994, so that the federal agency may determine that the federal action is in conformity with the specific requirements and the purposes of the applicable implementation plan pursuant to the agency's affirmative obligation under §176(c) of the federal Clean Air Act, and

c. A written determination of conformity under §176(c) of the federal Clean Air Act has been made by the federal agency responsible for the federal action by March 15, 1994.

D. Notwithstanding any provision of this regulation, a determination that an action is in conformity with the applicable implementation plan does not exempt the action

from any other requirements of the applicable implementation plan, NEPA, or the federal Clean Air Act.

9 VAC 5-160-120. Conformity analysis.

Any federal agency taking an action subject to this regulation shall make its own conformity determination consistent with the requirements of this part. In making its conformity determination, a federal agency shall consider comments from any interested parties. Where multiple federal agencies have jurisdiction for various aspects of a project, a federal agency may choose to adopt the analysis of another federal agency (to the extent the proposed action and impacts analyzed are the same as the project for which a conformity determination is required) or develop its own analysis in order to make its conformity determination.

9 VAC 5-160-130. Reporting requirements.

A. A federal agency making a conformity determination under 9 VAC 5-160-160 shall provide to the appropriate EPA regional office(s), department and local air quality agencies, and, where applicable, affected federal land managers, the lead planning organization, and the metropolitan planning organization, a 30-day notice which describes the proposed action and the federal agency's draft conformity determination on the action.

B. A federal agency shall notify the appropriate EPA regional office(s), department and local air quality agencies, and, where applicable, affected federal land managers, the lead planning organization, and the metropolitan planning organization within 30 days after making a final conformity determination under 9 VAC 5-160-160.

9 VAC 5-160-140. Public participation.

A. Upon request by any person regarding a specific federal action, a federal agency shall make available for review its draft conformity determination under 9 VAC 5-160-160 with supporting materials which describe the analytical methods and conclusions relied upon in making the applicability analysis and draft conformity determination.

B. A federal agency shall make public its draft conformity determination under 9 VAC 5-160-160 by placing a notice by prominent advertisement in a daily newspaper of general circulation in the area affected by the action and by providing 30 days for written public comment prior to taking any formal action on the draft determination. This comment period may be concurrent with any other public involvement such as occurs in the NEPA process.

C. A federal agency shall document its response to all the comments received on its draft conformity determination under 9 VAC 5-160-160 and make the comments and responses available, upon request by any person regarding a specific federal action, within 30 days of the final conformity determination.

D. A federal agency shall make public its final conformity determination under 9 VAC 5-160-160 for a federal action by placing a notice by prominent advertisement in a daily newspaper of general circulation in the area affected by the action within 30 days of the final conformity determination.

9 VAC 5-160-150. Frequency of conformity determinations.

A. The conformity status of a federal action automatically lapses five years from the date a final conformity determination is reported under 9 VAC 5-160-130, unless the federal action has been completed or a continuous program has been commenced to implement that federal action within a reasonable time.

B. Ongoing federal activities at a given site showing continuous progress are not new actions and do not require periodic redeterminations so long as the activities are within the scope of the final conformity determination reported under 9 VAC 5-160-130.

C. If, after the conformity determination is made, the federal action is changed so that there is an increase in the total of direct and indirect emissions above the levels in 9 VAC 5-160-30 E, a new conformity determination is required.

9 VAC 5-160-160. Criteria for determining conformity.

A. Any action required under 9 VAC 5-160-30 to have a conformity determination for a specific pollutant, shall be determined to conform to the applicable implementation plan if, for each pollutant that exceeds the rates in 9 VAC 160-30 E, or otherwise requires a conformity determination due to the total of direct and indirect emissions from the action, the action meets the requirements of subsection C of this section, and meets any of the following requirements:

1. For any criteria pollutant, the total of direct and indirect emissions from the action are specifically identified and accounted for in the applicable implementation plan's attainment or maintenance demonstration;

2. For ozone or nitrogen dioxide, the total of direct and indirect emissions from the action are fully offset within the same nonattainment or maintenance area through a revision to the applicable implementation plan or a similarly enforceable measure that effects emission reductions so that there is no net increase in emissions of that pollutant;

3. For any criteria pollutant, except ozone and nitrogen dioxide, the total of direct and indirect emissions from the action meet the requirements:

a. Specified in subsection B of this section, based on areawide air quality modeling analysis and local air quality modeling analysis; or

b. Meet the requirements of subsection A 5 of this section, and, for local air quality modeling analysis, the requirement of subsection B of this section;

4. For carbon monoxide or PM<sub>10</sub>:

a. Where the department determines (in accordance with 9 VAC 5-160-120 and 9 VAC 5-160-130 and consistent with the applicable implementation plan) that an areawide air quality modeling analysis is not needed, the total of direct and indirect emissions from the action meet the requirements specified in subsection B of this section, based on local air quality modeling analysis; or

b. Where the department determines (in accordance with 9 VAC 5-160-120 and 9 VAC 5-160-130 and consistent with the applicable implementation plan) that an areawide air quality modeling analysis is appropriate and that a local air quality modeling analysis is not needed, the total of direct and indirect emissions from the action meet the requirements specified in subsection B of this section, based on areawide modeling, or meet the requirements of subsection A 5 of this section; or

5. For ozone or nitrogen dioxide, and for the purposes of subsections A 3 b and A 4 b of this section, each portion of the action or the action as a whole meets any of the following requirements:

a. Where EPA has approved a revision to an area's attainment or maintenance demonstration after 1990 and the department makes a determination that as provided in subsection A 5 a (1) of this section or where the Commonwealth of Virginia makes a commitment as provided in paragraph A 5 a (2) of this section:

(1) The total of direct and indirect emissions from the action or portion thereof is determined and documented by the department to result in a level of emissions which, together with all other emissions in the nonattainment or maintenance area, would not exceed the emissions budgets specified in the applicable implementation plan.

(2) The total of direct and indirect emissions from the action or portion thereof is determined and documented by the department to result in a level of emissions which, together with all other emissions in the nonattainment or maintenance area, would exceed an emissions budgets specified in the applicable implementation plan and the governor or the governor's designee for state implementation plan actions makes a written commitment to EPA which includes the following:

(a) A specific schedule for adoption and submittal of a revision to the applicable implementation plan which would achieve the needed emissions reductions prior to the time emissions from the federal action would occur;

(b) Identification of specific measures for

incorporation into the applicable implementation plan which would result in a level of emissions which, together with all other emissions in the nonattainment or maintenance area, would not exceed any emissions budget specified in the applicable implementation plan.

(c) A demonstration that all existing applicable implementation plan requirements are being implemented in the area for the pollutants affected by the federal action, and that local authority to implement additional requirements has been fully pursued;

(d) A determination that the responsible federal agencies have required all reasonable mitigation measures associated with their action; and

(e) Written documentation including all air quality analyses supporting the conformity determination;

(3) Where a federal agency made a conformity determination based on a commitment from the Commonwealth of Virginia under subsection A 5 a (2) of this section, the commitment is automatically deemed a call for a revision to the applicable implementation plan by EPA under §110(k)(5) of the federal Clean Air Act, effective on the date of the federal conformity determination and requiring response within 18 months or any shorter time within which the Commonwealth of Virginia commits to revise the applicable implementation plan;

b. The action or portion thereof, as determined by the metropolitan planning organization, is specifically included in a current transportation plan and transportation improvement program which have been found to conform to the applicable implementation plan under 40 CFR Part 51, subpart T, or 40 CFR Part 93, subpart A;

c. The action or portion thereof fully offsets its emissions within the same attainment or maintenance area through a revision to the applicable implementation plan or an equally enforceable measure that effects emissions reductions equal to or greater than the total of direct and indirect emissions from the action so that there is no net increase in emissions of that pollutant;

d. Where EPA has not approved a revision to the relevant implementation plan attainment or maintenance demonstration since 1990, the total of direct and indirect emissions from the action for the future years (described in 9 VAC 5-160-170) do not increase emissions with respect to the baseline emissions;

(1) The baseline emissions reflect the historical activity levels that occurred in the geographic area affected by the proposed federal action during:

(a) Calendar year 1990;

(b) The calendar year that is the basis for the classification (or, where the classification is based on multiple years, the year that is most representative in terms of the level of activity), if a classification is promulgated in 40 CFR Part 81; or

(c) The year of the baseline inventory in the PM<sub>10</sub>-applicable implementation plan;

(2) The baseline emissions are the total of direct and indirect emissions calculated for future years (described in 9 VAC 5-160-170 D) using the historic activity levels (described in subsection A 5 d (1) of this section) and appropriate emission factors for the future years; or

e. Where the action involves regional water or wastewater projects or both, the projects are sized to meet only the needs of population projections that are in the applicable implementation plan, based on assumptions regarding per capita use that are developed or approved in accordance with 9 VAC 5-160-170 A.

B. The areawide or local air quality modeling analyses or both shall:

1. Meet the requirements of 9 VAC 5-160-170; and

2. Show that the action does not:

a. Cause or contribute to any new violation of any standard in any area; or

b. Increase the frequency or severity of any existing violation of any standard in any area.

C. Notwithstanding any other requirements of this section, an action subject to this section may not be determined to conform to the applicable implementation plan unless the total of direct and indirect emissions from the action is in compliance or consistent with all relevant requirements and milestones contained in the applicable implementation plan, such as elements identified as part of the reasonable further progress schedules, assumptions specified in the attainment or maintenance demonstration, prohibitions, numerical emission limits, and work practice requirements, and the action is otherwise in accordance with all relevant requirements of the applicable implementation plan.

D. Any analyses required under this section shall be completed, and any mitigation requirements necessary for a finding of conformity shall be identified in accordance with 9 VAC 5-160-180 before the determination of conformity is made.

9 VAC 5-160-170. Procedures for conformity determinations.

A. The analyses required under this section shall be based on the latest planning assumptions.

1. All planning assumptions (including, but not limited to, per capita water and sewer use, vehicle miles traveled per capita or per household, trip generation per household, vehicle occupancy, household size, vehicle fleet mix, vehicle ownership, wood stoves per household, and the geographic distribution of population growth) shall be derived from the estimates of current and future population, employment, travel, and congestion most recently approved by the metropolitan planning organization or other agency authorized to make the estimates, where available. The conformity determination shall also be based on the latest assumptions about current and future background concentrations and other federal actions.

2. Any revisions to these estimates used as part of the conformity determination, including projected shifts in geographic location or level of population, employment, travel, and congestion shall be approved by the metropolitan planning organization or other agency authorized to make the estimates for the urban area.

B. The analyses required under this subsection shall be based on the latest and most accurate emission estimation techniques available as described below, unless the techniques are inappropriate. If the techniques are inappropriate and written approval of the EPA Regional Administrator is obtained for any modification or substitution, they may be modified or another technique substituted on a case-by-case basis or, where appropriate, on a generic basis for a specific federal agency program.

1. For motor vehicle emissions, the most current version of the motor vehicle emissions model specified by EPA for use in the preparation or revision of the applicable implementation plan shall be used for the conformity analysis as specified in subsections B 1 a and B 1 b of this section.

a. The EPA shall publish in the Federal Register a notice of availability of any new motor vehicle emissions model.

b. A grace period of three months shall apply during which the motor vehicle emissions model previously specified by EPA as the most current version may be used. Conformity analyses for which the analysis was begun during the grace period or no more than three years before the Federal Register notice of availability of the latest emission model may continue to use the previous version of the model specified by EPA, if a final conformity determination is made within 3 years of the analysis.

2. For non-motor vehicle sources, including stationary and area source emissions, the latest emission factors specified by EPA in the "Compilation of Air Pollutant Emission Factors (AP-42)" shall be used for the conformity analysis unless more accurate emission data are available, such as actual stack test data from stationary

sources which are part of the conformity analysis.

C. The air quality modeling analyses required under this subpart shall be based on the applicable air quality models, databases, and other requirements specified in Appendix W of 40 CFR Part 51, unless:

1. The guideline techniques are inappropriate, in which case the model may be modified or another model substituted on a case-by-case basis, or, where appropriate, on a generic basis for a specific federal agency program; and

2. Written approval of the EPA Regional Administrator is obtained for any modification or substitution.

D. The analyses required under this subsection, except 9 VAC 5-160-160 A 1, shall be based on the total of direct and indirect emissions from the action and shall reflect emission scenarios that are expected to occur under each of the following cases:

1. The federal Clean Air Act-mandated attainment year or, if applicable, the farthest year for which emissions are projected in the maintenance plan;

2. The year during which the total of direct and indirect emissions from the action is expected to be the greatest on an annual basis; and

3. Any year for which the applicable implementation plan specifies an emissions budget.

9 VAC 5-160-180. Mitigation of air quality impacts.

A. Any measures that are intended to mitigate air quality impacts shall be identified (including the identification and quantification of all emission reductions claimed) and the process for implementation (including any necessary funding of the measures and tracking of the emission reductions) and enforcement of the measures shall be described, including an implementation schedule containing explicit timelines for implementation.

B. Prior to determining that a federal action is in conformity, the federal agency making the conformity determination shall obtain written commitments from the appropriate persons or agencies to implement any mitigation measures which are identified as conditions for making conformity decisions. The written commitment shall describe the mitigation measures and the nature of the commitment, in a manner consistent with subsection A of this section.

C. Persons or agencies voluntarily committing to mitigation measures to facilitate positive conformity determinations shall comply with the obligations of the commitments.

D. In instances where the federal agency is licensing, permitting, or otherwise approving the action of another governmental or private entity, approval by the federal agency shall be conditioned on the other entity meeting the mitigation measures set forth in the conformity determination as provided in subsection A of this section.

E. When necessary because of changed circumstances, mitigation measures may be modified so long as the new mitigation measures continue to support the conformity determination in accordance with 9 VAC 5-160-150 and 9 VAC 5-160-160 and this section. Any proposed change in the mitigation measures is subject to the reporting requirements of 9 VAC 5-160-130 and the public participation requirements of 9 VAC 5-160-140.

F. Written comments to mitigation measures shall be obtained prior to a positive conformity determination, and the commitments shall be fulfilled.

G. After EPA approves this regulation, any agreements, including mitigation measures, necessary for a conformity determination shall be both state and federally enforceable. Enforceability through the applicable implementation plan shall apply to all persons who agree to mitigate direct and indirect emissions associated with a federal action for a conformity determination.

9 VAC 5-160-190. Savings provision.

The federal conformity rules under 40 CFR Part 51 subpart W, in addition to any existing applicable Commonwealth of Virginia requirements, shall establish the conformity criteria and procedures necessary to meet the requirements of §176(c) of the federal Clean Air Act until such time as this regulation is approved by EPA. Following EPA approval of this regulation, the approved or approved portion of this regulation shall govern conformity determinations and the federal conformity regulations contained in 40 CFR Part 93 shall apply only for the portion, if any, of this regulation that is not approved by EPA. In addition, any previously applicable implementation plan requirements relating to conformity shall remain enforceable until the Commonwealth of Virginia revises its applicable implementation plan to specifically remove them and that revision is approved by EPA.

9 VAC 5-160-200. Review and confirmation of this chapter by board.

A. Prior to January 1, 2000, the department shall provide the board with an analysis to include (i) an assessment of the effectiveness of this chapter, (ii) the status of any specific federal requirements and the identification of any provisions more stringent than the federal requirements, (iii) the federal approval status of this chapter and (iv) an assessment of the need for continuation of this chapter.

B. Upon review of the department's analysis, the board shall confirm (i) the continuation of this chapter, (ii) the repeal of this chapter or (iii) the need to amend this chapter. If a decision is made in either of the latter two cases, the board shall authorize

the department to initiate the applicable regulatory process to carry out the decision of the board.

HISTORICAL NOTES:

Effective Date: January 1, 1997

Promulgated: January 1, 1997

Amended: January 1, 1998

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